

STATE OF MICHIGAN  
IN THE SUPREME COURT

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WILLIAM FRANK WARD,  
  
Plaintiff-Appellee,

Supreme Court No:  
124533

vs.

Court of Appeals No:  
234619

CONSOLIDATED RAIL CORPORATION,  
d/b/a Conrail, a Pennsylvania corporation,  
  
Defendant-Appellant.

Lower Court No:  
99-903048-NI

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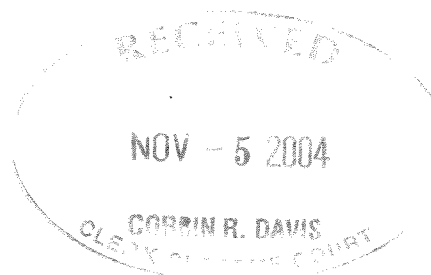
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**PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO**  
**DEFENDANT-APPELLANT'S APPLICATION FOR**  
**LEAVE TO APPEAL (RE: ADVERSE INFERENCE**  
**INSTRUCTION)**

**PROOF OF SERVICE**



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## STATEMENT OF QUESTIONS PRESENTED

- I. SHOULD LEAVE TO APPEAL BE DENIED, OR SHOULD THE JUDGMENT BE AFFIRMED, AS THE INSTRUCTIONS WERE NOT “INCONSISTENT WITH SUBSTANTIAL JUSTICE” IN ADVISING THE JURY ON THE PRINCIPLE OF LAW EMBODIED IN M CIV J I 6.01?

Plaintiff-Appellee answers “YES”.

- B. IS THE CORE PRINCIPLE OF MICHIGAN LAW EMBODIED IN M CIV J I 6.01 WELL-SETTLED AND SHOULD NOT BE DISTURBED?

Plaintiff-Appellee answers “YES”.

- C. DO THE FACTS OF THIS CASE IMPLICATE THAT PRINCIPLE?

Plaintiff-Appellee answers “YES”.

- D. WAS THE COURT’S PRE-TRIAL RULING REVERSIBLY ERRONEOUS?

Plaintiff-Appellee answers “NO”.

- E. WAS THE PERMISSIBLE INFERENCE JURY INSTRUCTION REVERSIBLY ERRONEOUS?

Plaintiff-Appellee answers “NO”.

## STATEMENT OF FACTS

### Introduction

By Order of October 1, 2004, this Court scheduled oral argument on Defendant's Application for Leave to Appeal. The primary issue of concern<sup>1</sup> revolves around jury instructions addressing the principle articulated in M Civ JI 6.01 - - that the jury is allowed, but not required, to draw an inference adverse to a party that fails to present or destroys evidence within its control. As invited by the Order,<sup>2</sup> Plaintiff now files this Supplemental Brief addressed to the questions involving the instruction on point.

In the main, Plaintiff relies on the Statement of Facts of his earlier Brief in Opposition to Application for Leave to Appeal. However, the specific facts which frame the issues identified in the Court's Order warrant special attention.

### Overview

Plaintiff William Frank Ward was a locomotive engineer employed by Defendant Conrail. At about 7:15 p.m. on February 19, 1998, he attempted to secure

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<sup>1</sup>The Order provided that, "The parties shall address whether the trial court correctly determined that plaintiff was entitled to a presumption that the missing evidence was defective, whether the jury was properly instructed, and whether any error was harmless".

<sup>2</sup>"Supplemental Briefs may be filed within 28 days of the date of this order".

locomotive 8181 by setting (applying) the ratchet-style manual handbrake on that engine. As Ward was ratcheting the handle of the brake in an upward motion, it stopped unexpectedly and suddenly (Tr. IV, p. 152). Mr. Ward felt a snap, and immediate pain, in his lower back (*Id.*). The medical evidence presented at trial established that Plaintiff sustained disc injuries, which resulted in a laminectomy, disc fusion, and other surgery because of this injury (Plaintiff's trial Exhibits 58, 127, p. 3; Rapp dep., pp. 56-57).

#### **The Operation of The Hand Brake Mechanism**

The handbrake assembly is operated by a chain which, when the brake is being applied or released, passes through a housing containing a sprocket. By ratcheting the handbrake lever, the chain is tightened, and through a series of mechanical advantages, the engine's brake shoes are clamped down on its wheels, thus securing the engine in the desired location. A separate lever, but an integral part of the same mechanism, is used to release the brake (Tr. II, pp. 202-211).

#### **The Evidence About How The Handbrake Jammed**

The efficient and proper operation of the handbrake depends on the links passing unhindered through the brake housing as the mechanism is being tightened. In this instance, at an unknown time prior to Mr. Ward's injury, the chain had broken

and been mended with a U-shaped device or replacement link, known as a clevis.

It was Plaintiff's theory of the case, supported by both fact witnesses and an expert, that the clevis was slightly larger than the links of the chain, resulting in unpredictable, random jammings of the clevis up against the brake housing. If sufficient force were applied, the clevis could actually be pulled all the way into the housing, resulting in the mechanism being jammed to the point it could not be released. This oversized clevis caused random, dangerous sudden stops to the ratcheting operation of the handbrake just as suffered by Plaintiff Ward in the application mode, or jammings of the clevis into the housing such that the brake could not be released (Tr. III, pp. 10-21). Because the jamming occurred sporadically, and because of the nature of the problem, it was not readily discernable in causal inspections conducted before and after Plaintiff's injury.

#### **The Prior Problems With The Handbrake In Issue**

There was evidence in the case from three employees of the railroad (Mr. Parker, Mr. Sullivan, and Mr. Ward) as well as one management individual, Mr. Barr, that this particular handbrake had been causing problems for two to three months prior to Mr. Ward's injury of February 19, 1998. Plaintiff himself had complained to Mr. Barr about this very handbrake jamming to the point it could not be released (Tr. IV,

pp. 144-145).

A co-worker of Plaintiff, Mr. Parker, testified that he had experienced a number of instances where this same handbrake had stopped suddenly in application, as well as jammed in the release mode, over a two to three month period of time before the Ward injury. Further, he had reported the handbrake's defective condition to management, Mr. Barr (Tr. III, pp. 70, 72-73, 76). Mr. Barr, the supervisor, acknowledged these prior complaints concerning the handbrake and admitted that he knew the chain had been mended with a clevis some time prior to the Ward injury (Barr dep., p. 31). Unfortunately, Mr. Barr did not report the handbrake as defective or send the locomotive in for repairs until after Plaintiff Ward had been injured (Barr dep., pp. 35-36).

#### Defendant's Destruction of The Evidence

The injury occurred on February 19, 1998 at 7:15 p.m.. Plaintiff reported the incident, the injury, and the defective condition of the handbrake the following morning at 8:30 a.m. He did this by filing the required personal injury report, and, in fact, Mr. Barr took Plaintiff to the hospital that morning for medical attention (Tr. IV, p. 158). The Defendant railroad's claim agent took a statement from Plaintiff on February 25, 1998, confirming both the injury and the defective nature of

the handbrake. That same claim agent also took statements from Mr. Sullivan and Mr. Parker on March 3 and March 9, 1998 respectively, attesting to their prior problems with the mechanism which had been brought to the attention of management prior to Plaintiff Ward's injury. A report filed by Mr. Barr, the supervisor, dated March 9, 1998, confirmed that the handbrake mechanism was defective.

Accordingly, by March 11, 1998, Defendant knew about the multiple prior complaints about the handbrake malfunctioning, both in application and release modes, the oversized clevis, and Plaintiff's injury. That day, the locomotive went to the Elkhart Diesel Shop along with documents indicating that there was a defective hand-brake on the locomotive engine (Tr. III, pp. 89-91, 98). Defendant then destroyed the chain, housing, clevis and all related component parts before they could be photo-graphed, measured, inspected or tested on behalf of Plaintiff (Tr. III, p. 102).

Notwithstanding Conrail's knowledge of the injury and claimed defective equipment, Conrail failed to do anything to preserve this critical evidence in any way.

As a result, the condition of the mechanism at that time - - particularly scarring or deformation from contact with the oversized clevis - - was not preserved physically or photographically. The clevis itself was not measured, nor were the other

links in the chain. The opening in the brake housing was not measured or photographed. It was no longer possible to conduct measurements or tests to prove beyond doubt that the handbrake worked inefficiently and improperly both in the application and release modes. In point of fact, the mechanic who threw away the critical physical evidence testified that the slightly oversized clevis could cause the handbrake mechanism not to function properly or as intended when applying the handbrake - - exactly what Plaintiff was attempting to do when he was injured (Tr. III, p. 107):

“Q. (MR. ROE) And, Sir, that clevis being in the handbrake mechanism, could cause it not to function properly or as intended when applying the handbrake, isn’t that true, sir?

A. While applying the handbrake?

Q. Yes.

A. Yes.”

### The Lawsuit

In due course, Plaintiff filed this suit. The Complaint alleged violations of the Federal Employer’s Liability Act (“FELA”) 45 USC § 53 *et seq*; Federal Safety Appliance Act (“FSAA”), 49 USC § 20302; and Locomotive Inspection Act (“LIA”) 49 USC § 20701, *et seq*.

### The Trial Court Rulings In Issue

Plaintiff filed a pretrial Motion for Partial Summary Disposition.<sup>3</sup> In support, Plaintiff demonstrated to the trial court that Defendant knew of a serious injury, knew it occurred due to the claimed defective handbrake, and knew there had been multiple complaints about this same piece of equipment, yet failed to do anything to preserve this critical evidence.

The trial court did not grant Plaintiff's Motion. She did, however, enter an Order providing that "Plaintiff is entitled to a presumption that the hand brake being used by Plaintiff on February 19, 1998 was defective because it was destroyed" (Defendant's Application, Ex. A).

In so ruling, the court made it clear that the ruling pertained to the summary disposition motion. She declared that, as to jury instructions, her ruling would depend on the trial evidence (Tr. 2/18/00, pp. 13-15).

At trial, the court was initially inclined to instruct the jury that it could permissibly draw a presumption adverse to Defendant because of its destruction of the

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<sup>3</sup>In opposing the motion, Defendant offered an Affidavit, untested by cross-examination, in which its employee, Mr. Chandler, admitted that he had changed and discarded the chain (Defendant's Application, Ex. 4, ¶ 20). He claimed that this occurred "in the ordinary course of business" (*Id.*), and that he did not "deliberately" discard or destroy the evidence, because he had not been made aware of Plaintiff's reported injury (*Id.*, ¶¶ 10, 11).

handbrake (Tr. VI, pp. 210-215). Ultimately, the court acceded to Plaintiff's request not to use the term "presume", but instead to instruct on a permissible "inference".

The actual instruction was (Tr. VIII, p. 8):

"The Court made a determination that there was a presumption that the handbrake at issue was defective due to the fact that the handbrake clevis and chain were discarded by the defendant. The defendant railroad has come forward with some evidence to rebut this presumption. Accordingly, the law requires that I instruct you as follows:

Certain evidence relevant to this case, namely the handbrake, the clevis and chain, were not available at trial because they were destroyed while in the possession or in the control of the defendant. The rules of evidence provide that you, the jury, may infer that this evidence was unfavorable to the defendant."

Among numerous objections (most of which have since been abandoned), defense counsel voiced his objection to this instruction (Tr. VIII, p. 26):

"The defendant objects to the presumption instruction or the revised presumption instruction that was given today. We object to the fact that the requested instruction by the defendant regarding inference that the prior and post condition of the brake should have been considered." (*sic*)

### The Verdict

The jury returned its verdict, finding that Conrail had violated the FSAA,

but not FELA or LIA (Tr. VIII, pp. 42-43).<sup>4</sup> The jury determined that Plaintiff sustained damages of \$800,000 (Tr. VIII, p. 44).

### The Court of Appeals Decision

On appeal, the Court of Appeals (Judges Sawyer, Meter, and Schuette) issued a *per curiam* Opinion affirming. The Court recognized that the evidence established that Plaintiff had already made the injury report when Defendant discarded the evidence (Opinion, p. 2). And, the Court recognized that the instruction given by the court to the jury allowed an “inference”, not a “presumption” (Opinion, pp. 2-3). In short, the appellate court found no reversible error in the trial court’s rulings regarding Defendant’s destruction of evidence after learning of Plaintiff’s injury.

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<sup>4</sup>As pointed out in Plaintiff’s initial Brief in Opposition to the Application, pp. 16-27, the FSAA verdict reflects a finding that the handbrake was not “efficient” at the time in issue (Tr. VIII, p. 43). The verdict on the other claims reflects a finding that Conrail was not negligent (FELA) and that the handbrake was in “proper condition and safe” (LIA) (Tr. VIII, pp. 42-43) (See Ex. 1 to Defendant’s Application).

## LAW AND ARGUMENT

### **I. LEAVE TO APPEAL SHOULD BE DENIED, OR THE JUDGMENT SHOULD BE AFFIRMED, AS THE INSTRUCTIONS WERE NOT “INCONSISTENT WITH SUBSTANTIAL JUSTICE” IN ADVISING THE JURY ON THE PRINCIPLE OF LAW EMBODIED IN M CIV J I 6.01**

In the final analysis, Plaintiff submits that there was no reversible error in the instructions on point. Leave should be denied or the Judgment affirmed.

#### **A. STANDARD OF REVIEW OF CLAIMS OF INSTRUCTIONAL ERROR**

No instructional issue is preserved for appellate review in the absence of a specific and timely objection before the jury deliberates. MCR 2.516(C)<sup>5</sup>; *Setterington v Pontiac General Hospital*, 223 Mich App 594, 609; 568 NW2d 93 (1997); *Thorin v Bloomfield Hills Board of Education*, 203 Mich App 692, 698; 513 NW2d 230 (1994); *Duma v Janni*, 26 Mich App 445, 452; 182 NW2d 596 (1970).

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<sup>5</sup>

“A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objections out of the hearing of the jury.” (emphasis added)

Where a timely, specific objection is made, the role of instructing the jury is one reposed in the trial court, who has observed the vibrant trial context. The trial judge is accorded considerable discretion to determine the applicability of a requested instruction, within the context of the unique nature of the case. *Johnson v Corbet*, 423 Mich 304, 326-327; 377 NW2d 713 (1985); *Luidens v 63<sup>rd</sup> District Court*, 219 Mich App 24, 27; 555 NW2d 709 (1996); *Rice v ISI Mfg, Inc*, 207 Mich App 634, 637; 525 NW2d 533 (1994); *Clark v K-Mart Corp, (On Remand)*, 249 Mich App 141, 147; 640 NW2d 892 (2002) (no abuse of discretion in giving permissible adverse inference instruction, despite defendant's "standard protocol" explanation).

The court need not use any particular instructional language. *Tomei v Bloom Associates*, 75 Mich App 661, 668; 255 NW2d 727 (1977); *Pratt v Berry*, 37 Mich App 234, 235; 194 NW2d 465 (1971). There is no basis for reversal if the instructions, as given, adequately and fairly presented the theories and applicable law. *Setterington*, 223 Mich App at 605; *Williams v Coleman*, 194 Mich App 606, 623; 488 NW2d 464 (1992); *Cox v Flint Hospital Managers (On Remand)*, 243 Mich App 72, 85; 620 NW2d 859 (2000).

In the final analysis, a jury instruction ruling, even if properly objected to, is grounds for a new trial only where "inconsistent with substantial justice". *Johnson*,

*supra*; MCR 2.613(A); *In re Flury Estate*, 249 Mich App 222, 226; 641 NW2d 863 (2002).

**B. THE CORE PRINCIPLE OF MICHIGAN LAW EMBODIED IN M CIV J I 6.01 IS WELL-SETTLED AND SHOULD NOT BE DISTURBED**

Modern Michigan cases will not allow the mishandling of critical evidence to go unremedied. The loss or mishandling of evidence in a way that denies the adversary the possible advantage of inspection or use may result in the exclusion of evidence, *Hamman v Ridge Tool Co*, 213 Mich App 252, 255-258; 539 NW2d 753 (1985)<sup>6</sup>; *MASB-SEG v Metalux*, 231 Mich App 393, 401; 586 NW2d 549 (1998). Or, the court may dismiss the case completely. *Brenner v Kolk*, 226 Mich App 149, 163-165; 573 NW2d 65 (1997).

These remedies do not depend on bad faith. They are available to redress unintentional losses as well. Nor it is necessary to prove what the lost evidence, if produced, would have shown. Indeed, the party losing the evidence has made it impossible to prove prejudice with any more definitiveness. Thus, in civil litigation, the loss or destruction of evidence entitles the adverse party to some measure of relief.

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<sup>6</sup>In *Hamman*, the Court adopted the principle that, “[W]here one party wrongfully denied another the evidence necessary to establish a fact in dispute, the court should draw the strongest allowable inferences in favor of the aggrieved party” (213 Mich App at 256).

An adverse inference instruction is the minimum measure of relief [see *Brenner*, 226 Mich App at 161, 164]. In fact, M Civ J I 6.01(d) provides for such an instruction, even when there is a legitimate dispute over whether the litigant once “controlled” the evidence and whether there was “reasonable excuse” for non-production.<sup>7</sup> The failure to advise the jury that the law permits such an inference is regarded as reversible error. *Cole v Railway Co*, 81 Mich 156, 165; 45 NW 983 (1890); *Vergin v City of Saginaw*, 125 Mich 499, 503; 84 NW 1075 (1901).

Significantly, the permissible adverse inference is not punitive in nature. Rather, it is one founded in legal experience and common sense. Self interest will ordinarily motivate one to preserve and present favorable evidence. Where a litigant loses, destroys or fails to present evidence, it is reasonable to infer that the unproduced evidence is contrary to that party’s interest.<sup>8</sup>

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<sup>7</sup> “The [plaintiff/defendant] in this case has not offered [the testimony or (name) / (identify exhibit)]. You may infer that this evidence would have been adverse to the [plaintiff/defendant] if you believe that the evidence was under the control of the [plaintiff/defendant] and could have been produced by [him/her], and no reasonable excuse for [plaintiff’s / defendant’s] failure to produce the evidence has been shown.”

<sup>8</sup>An illustration of this inference is the erasure of President Nixon’s tapes regarding the Watergate affair. Many have inferred that the erasure indicates that the tapes were contrary to the President’s position that he had no role in the Watergate burglary or coverup.

The appellate courts have often upheld instructions which educate the jury that it is permitted to infer that evidence which a party failed to present would be adverse to that party's position. *Dowagiac Mfg Co. v Schneider*, 181 Mich 538, 541; 148 NW 173 (1914); *Griggs v Saginaw R Co*, 196 Mich 258, 265; 162 NW 960 (1917); *Cassibo v Baldwin*, 149 Mich App 474, 479-480; 386 NW2d 589 (1986); *Clark v K-Mart, supra*; *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 520-521; 592 NW2d 786 (1991).

The fundamental principle is that Michigan law allows the conclusion that, when a litigant destroys, or fails to present, evidence within its control, the unproduced evidence would have been adverse to that litigant's position. It is entirely appropriate to convey that principle to the jury by instruction. That core principle should not be disturbed.

### **C. THE FACTS OF THIS CASE IMPLICATE THAT PRINCIPLE**

The record reveals that the handbrake mechanism had a history of jamming, duly reported to, and known by, the trainmaster, Mr. Barr. Conrail also had timely and adequate notice that Plaintiff was injured when the chain jammed because this same trainmaster, who had experienced the defect himself, took the Plaintiff to the hospital. Despite this knowledge, Defendant destroyed or discarded

the injury-causing mechanism before it could be photographed, inspected by Plaintiff, analyzed, tested, or presented to the jury. The record fully establishes the predicate for the inference - - significant evidence, within the control of Defendant, unavailable for evidentiary use, because it was destroyed or discarded by Defendant.

Defendant suggests that the trial court was obliged to accept its excuse for non-production and, for that reason, not to permit the jury to consider the applicable legal principle. That argument is flawed.

First, the trial judge and Plaintiff were not required to accept, as Gospel, Defendant's self-serving protestation of innocent intent. See *Walker v Cahalan*, 411 Mich 857; 306 NW2d 99 (1981); *Tumbarella v The Kroger Co*, 85 Mich App 482, 492; 271 NW2d 284 (1978). The intentional discard of the evidence, only three weeks after Plaintiff's injury, is especially ominous in light of the history of jammings that would ordinarily be known to the maintenance personnel who discarded the injury-causing product.

Secondly, the effect of destruction was to permit Defendant alone, not Plaintiff or the jury, to inspect or use the product as evidence. The conduct of Defendant, and Defendant alone, is responsible for the non-availability of significant evidence. In view of the remedial nature of the inference, it is permissible to consider that Defen-

dant alone is responsible for the unavailability of the product, without the need to conduct a futile search for the “subjective intent” of a corporate entity incapable of “intent”. See *e.g. Hamman; Beck v Haik*, 377 F3d 624, 640-641 (6<sup>th</sup> Cir, 2004).

The principle embodied in M Civ J I 6.01 does not require the proponent to prove “ability to anticipate litigation” by a single corporate employee most directly responsible for non-production.

Finally, it is fallacious for Conrail to argue that it is absolved of responsibility because, it suggests, its “right hand” (trainmaster and claims personnel) and “left hand” (maintenance personnel) were oblivious to the acts and knowledge of the other. All involved were employees of a corporate institution, acting in the course of their employment. The combined acts and knowledge of all its employees are imputed to the corporation, which can act only through those employees. See *People v American Medical Centers of Michigan, Ltd*, 118 Mich App 135, 155-156; 324 NW2d 782 (1982); *Turner v Mutual Ben Health & Acc Ass’n*, 316 Mich 6, 21; 24 NW2d 534 (1946) (knowledge of an agent on a material matter, acquired within the scope of the agency, is imputed to the principal); *Cox ex rel Cox v Board of Hosp Managers for City of Flint*, 467 Mich 1, 11; 651 NW2d 356 (2002) (agent’s acts are the principal’s acts).

In all events, there is ample, indeed overwhelming, proof that critical

evidence could not be presented because, while the evidence was in Defendant's control, Defendant destroyed it. The trial judge correctly concluded that the relevant legal principle was applicable.

#### **D. THE COURT'S PRE-TRIAL RULING WAS NOT REVERSIBLY ERRONEOUS**

By pre-trial ruling, the trial court recognized a "presumption" arising from Defendant's destruction of evidence, reserving for trial the issue of how the jury might be instructed (Tr. 2/18/00, pp. 13-15). Ultimately, the jury was instructed that Defendant had successfully come forward with evidence to "rebut" any such "presumption" and that what remained was merely a permissible (not mandatory) inference which they jury could draw if it chose (Tr. VIII, p. 8). As discussed in subsection E, *infra*, the jury instructions were not reversibly erroneous.

Seizing on the court's use of the "presumption" nomenclature, Defendant suggests that even if the jury instructions on a permissible inference were proper, the use of the term "presumption" in the pre-trial Order was incorrect. Conrail's contention that the use of the word "presumption" entitles it to a new trial is untenable. As will be shown, there was nothing incorrect about the court's use of the word "presumption" as meaning, in substance, the pre-trial inference to be drawn in the absence of any explanatory testimony [subsection (1), *infra*]. In all events, even if the

pre-trial nomenclature was inaccurate, that ruling was harmless, as the instructions given to the jury identified the allowed consideration as a permissible inference [subsection (2)].

(1) The Court Did Not Err In Using The Term “Presumption” To Describe The Pre-Trial Inference Drawn Before The Presentation Of Testimony At Trial.

Much of the furor arises from the use of a term, “presumption”, that can have different legal meanings. The trial judge used the term to describe the conclusion drawn by her in the absence of, and prior to, trial testimony; before the sworn testimony converted the permitted conclusion from a “presumption” to a “permissible inference”. Semantic nuance aside, the trial court’s conception was consistent with Michigan law.

The nature and effect of “presumptions” and “inferences” were examined by this Court in *In re Wood Estate*, 374 Mich 278; 132 NW2d 35 (1965). Briefly stated, certain “presumptions” are mere procedural devices, dictating the burden of production and the result in the absence of evidence, which evaporate with the introduction of evidence (see *Wood*, 374 Mich at 289).

Other “presumptions” are the product of human experiences and reason.

For example, one might say that, “the law presumes that a person intends the ordinary consequences of his or her acts”. In saying that, one is saying, in effect, that in ordinary human experience, people do intend the consequences of their act; when they point a loaded gun at someone and pull the trigger, they probably intend to inflict a gunshot wound. Although the actor may present evidence that the gunshot wound was not intended, the reason behind the “presumption” remains and, in the face of evidence to the contrary, remains as a permissible inference of evidentiary stature (*Wood*), 374 Mich at 290-291).

In the context involved in this case, the reasoning in issue is based on common sense and common experience. Reasonable people do tend to preserve evidence that will favor their litigation position. Their natural motive is to destroy only that evidence which is unfavorable. Proof of evidence destruction can therefore fairly be said to give rise to a “presumption” (in the face of no contrary evidence) which, when rebutted, remains as a “permissible inference”.

Consistent with that analysis, this Court has viewed the inference or presumption as evidentiary in nature, supporting a verdict for the non-suppressing party. *Cooley v Foltz*, 85 Mich 47, 49; 48 NW 176 (1891); *Brandt v C.F. Smith & Co*, 242 Mich 217, 222; 218 NW 803 (1928); *Leeds v Masha*, 328 Mich 137, 140; 43

NW2d 92 (1950); *Prudential Ins Co v Cusick*, 369 Mich 269, 285; 120 NW2d 1 (1963); *In re Petition of Upjohn*, 256 Mich 181, 193; 239 NW 359 (1936). The inference arising from non-production is so great that, in *Fontana v Ford Motor Co*, 278 Mich 199, 203-204; 270 NW 266 (1936), this Court cited the plaintiff's failure to present a knowledgeable witness in concluding that a verdict for the plaintiff was against the weight of the evidence.

In *Widmayer v Leonard*, 422 Mich 280, 288-289; 373 NW2d 538 (1985), this Court clarified (in a different context) the role of a "presumption" as the pre-evidence focus and "permissible inference" as the reasoning allowed after the introduction of evidence:

"Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence."

The trial court's approach is consistent with *Widmayer*. For pretrial purposes, where there had been no explanatory testimony (just an affidavit untested by cross-examination), the trial judge regarded the conclusion to be drawn from destruction as a "presumption". By the time of trial, when rebutting evidence was presented,

the trial court correctly told the jury that the permitted reasoning was an “inference”. The court thus correctly regarded the conclusion drawn from destruction as a “presumption” for pre-trial purposes, which became a “permissible inference” by the end of trial, after evidence on point had been presented.

The trial court’s ruling is also consistent with the case law use of the term “presumption” in the specific context of evidence destruction. Earlier decisions of this Court have used the term “presumption” to describe the conclusion drawn from non-production of evidence within a party’s control. See *Brandt*, 242 Mich at 222; *Griggs*, 196 Mich at 266; *Leeds*, 328 Mich at 140; *Long v Earle*, 277 Mich 505, 516; 269 NW 577 (1936).

Citing *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957) and *Lagalo*, Conrail argues that there could be no “presumption” because its destruction of the evidence was not intentional. That approach misconceives the trial court’s use of the term to describe her tentative pre-trial conclusion. And, it misconceives the critical differences between this case and *Trupiano* and *Lagalo*.

In *Trupiano*, the plaintiff had discarded original notes and memoranda. The defendant claimed that this constituted “spoliation”, but there was no request for a jury instruction on point (349 Mich at 571). The court noted that, at trial, a

permissible inference might arise, but there was no reversible instructional error in the absence of a request (349 Mich at 570-571). Here, of course, there was a jury instruction on point which correctly characterized the allowed conclusion from non-production as a permissible inference.

*Lagalo* is not on point for similar reasons. There, the Court of Appeals held that an instruction on a presumption from non-produced evidence would require intentionality, but a permissible inference would not (233 Mich App 520-521). The Court concluded, as Plaintiff here urges, that a “permissible inference” instruction in the proper trial treatment.

The discussion of “presumption” in *Trupiano*, then later in *Lagalo*, consists of a quotation from an Am Jur treatise that a “presumption” (in contrast to a “permissible inference”) arises from “intentional spoliation or destruction of evidence”, “where there was intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth”. After its decision in *Trupiano*, this Court explained in *Johnson v Secretary of State*, 406 Mich 420, 440 (1979):

“The rule is well established that where there is a deliberate destruction of or failure to produce evidence in one’s control a presumption arises that if the evidence were produced it would operate against the party who deliberately destroyed or failed to produce it.” (footnote omitted).

Even used in that context, this case shows the “deliberate destruction” or “intentional . . . destruction of evidence” or “intentional conduct” referred to in *Trupiano* and *Johnson*. Indisputably, the evidence was destroyed “intentional[ly]” and “deliberate[ly]”. There was no contention that it was just inadvertently misplaced. Thus, at least for pretrial purposes, the court correctly used the term “presumption” in the sense of a conclusion drawn from the non-availability of evidence due to deliberate destruction rather than accidental misplacement.

To summarize, here the trial court used the term “presumption” to refer to the tentative pretrial conclusion to be drawn before the presentation of evidence and resultant transformation to a “permissible inference” by the time of jury instruction. That pretrial use of the term “presumption” was in keeping with the decisions on point.

(2) Since The Jury Was Instructed That Only A Permissible Inference Arose, The Pre-Trial Ruling Was Moot Or Harmless

Even assuming *arguendo* that the pretrial nomenclature “presumption” was erroneous, and “inference” would have been more accurate, this does not entitle Defendant to avoid the jury’s verdict. An “error” is cause for a new trial only if it affected the result. An “error” which did not affect the result is no cause for reversal. MCR 2.613(A); *Britton v Updyke*, 357 Mich 466, 474; 98 NW2d 660 (1959); *Dahlem*

*v Hackley Bank & Trust Co*, 361 Mich 609, 617; 106 NW2d 121 (1960).

Here, the trial court's instructions to the jury made it clear that only a permissible inference ("may infer") was involved (Tr. VIII, p. 8). Other instructions told the jury that arguments of counsel did not constitute evidence (Tr. VIII, p. 4),<sup>9</sup> and that the jury was to follow the court's instructions on the law (Tr. VIII, p. 4). On appeal, the jury must be deemed to have followed the instructions. See *Aldrich v Drury*, 15 Mich App 47; 165 NW2d 892 (1968); *Cranson v Eastman*, 28 Mich App 560; 184 NW2d 480 (1970); *Wood v Detroit Edison Co*, 409 Mich 279, 289; 294 NW2d 571 (1980) (Coleman, C.J., concurring); *Stitt v Mahaney*, 403 Mich 711, 718-719, 737; 272 NW2d 526 (1978).

The jury was properly instructed that only a permissible inference, not a presumption, was involved (Tr. VIII, p. 8). It decided the case on the basis of the trial instructions, not a pretrial ruling. Since the pretrial "presumption" ruling became

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<sup>9</sup>Defendant has complained that Plaintiff's counsel referred to the court's pretrial ruling in the jury's presence. Even if this could somehow be deemed improper - - and it cannot - - this instruction has often been regarded as curing any impropriety. See *Nation v W D E Electric Co*, 213 Mich App 694, 696; 50 NW2d 788 (1975); *Crenshaw v Goza*, 43 Mich App 437, 445; 204 NW2d 302 (1972); *Conerly v Liptzen*, 41 Mich App 238, 245; 199 NW2d 833 (1972); *Megge v Lumbermens Mutual Casualty Co*, 45 Mich App 119, 124; 206 NW2d 245 (1973); *Kirk v Ford Motor Co*, 147 Mich App 337, 348; 383 NW2d 193 (1985); *Belue v Uniroyal, Inc*, 114 Mich App 589, 596-597; 319 NW2d 369 (1982). Moreover, the court's instruction, that Defendant had successfully presented evidence rebutting any "presumption", gave further benefit to Conrail in focusing the jury's attention on the "permissible inference" standard.

one of permissible inference in the jury instructions, the correctness or incorrectness of the term “presumption” in the pretrial Order must be regarded as moot or harmless.

**E. THE PERMISSIBLE INFERENCE JURY INSTRUCTION WAS NOT REVERSIBLY ERRONEOUS**

The real issue presented is whether the instructions received by the jury were reversibly erroneous under the standards discussed in subsection A above. They were not.

**(1) The Law And Evidence Justified An Instruction Permitting An Adverse Inference**

The instruction ultimately given, “You may infer that this evidence was unfavorable to the defendant” (Tr. VIII, p. 8), did not compel the jury to draw an inference adverse to Conrail. The jury instruction was couched in “inference”, not “presumption” terms. The fundamental “permissible inference” format does not offend, and is fundamentally consistent with, the principles of the numerous cases referred to above [see subsections B, D; pp. 12-14, 20 of this Supplemental Brief].

The instruction was fully justified by the evidence discussed at pages 4-6, 14-17 of this Supplemental Brief. Simply put, Conrail’s employees knew of Plaintiff’s injury; knew that it was caused by the chain jamming; knew that the chain

and clevis were claimed to be defective; yet destroyed the injury-causing mechanism before it could be inspected by Plaintiff, or preserved for presentation as trial evidence for the jury's consideration. These facts fully support the giving of an adverse inference instruction under the principles of Michigan case law.

(2) **Defendant Has Preserved No Objection To The Specific Form Of The Instruction**

After trial, Defendant complained, for the first time, that the instruction, as given, omitted the "If you believe . . . no reasonable excuse . . . has been shown"<sup>10</sup> limitation found in M Civ J I 6.01(d). If a timely objection had been made, Plaintiff might have acquiesced in a modified version to placate Defendant. If the oversight had been raised in a timely fashion, the trial judge may have given the model instruction verbatim. For these reasons, the claimed deviation of the actual instruction from M Civ J I 6.01 is attributable, at least in part, to Defendant's own failure to make any timely objection to the form of the permissible inference instruction given.<sup>11</sup>

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<sup>10</sup>The language of the Model Instruction, "If you believe no reasonable excuse has been shown", seemingly imposes on the party seeking to avoid the adverse inference the burden of producing evidence of excuse. The instruction thus confirms the pretrial existence of a "presumption" - - in the burden of coming forward sense - - that arises once the proponent shows the destruction of evidence within the adversary's control.

<sup>11</sup>As given, the instruction was at least adequate to convey the controlling "permissible adverse inference" principle. The silence of defense counsel at trial confirms that the variance  
(continued...)

The overarching principle is that a party may not complain on appeal about an “error” to which its counsel contributed at trial. *Belfry v Anthony Pools*, 80 Mich App 118, 123; 262 NW2d 909 (1977); *Joba Construction v Burns & Roe*, 121 Mich App 615, 629-630; 329 NW2d 760 (1982).

Defendant’s post-trial complaint about the form of the instruction is not preserved for review, as there was no timely specific objection on that ground at trial. A general objection, or objection on different grounds at trial, does not preserve an instructional issue for review. MCR 2.516(C); *Hammack v Lutheran Social Services*, 211 Mich App 1, 10; 535 NW2d 215 (1995); *Kotila v McGinty*, 28 Mich App 396, 397-398; 184 NW2d 462 (1970).

(3) The Jury’s Verdict, Which Found For Defendant On Two Causes of Action, Demonstrates That The Instruction Did Not Affect The Result

Where the jury’s verdict makes it clear that the instruction in issue did not affect the result, even an erroneous instruction provides no ground for a new trial. *Britton, supra*. That principle is fully applicable to the instant case.

The instruction at issue was equally applicable to all causes of action

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<sup>11</sup>(...continued)

between the model instruction and that given was so insignificant that it was not even noticed in the vibrant context of the trial.

asserted. If the jury had chosen to draw the adverse inference which was allowed, and to use that inference in reaching its ultimate verdict, Plaintiff would have prevailed on all three causes of action. Instead, the jury found for Defendant on the actions under FELA and LIA (Tr. VIII, pp. 42-43). It found for Plaintiff only on the FSAA cause of action, which focuses on whether the brake was “efficient” at the time in question, an issue which turned on the jamming itself, without regard to fault or the permitted inference. As the divided verdict makes clear, the jury did not return its FSAA verdict against Defendant based on the inference which the instruction allowed. Rather, the jury assessed the separate liability theories on the basis of their distinct legal merits and the other evidence *de hors* the permitted inference. The split verdict thus demonstrates that the verdict for Plaintiff on the FSAA claim was not based on the instruction here at issue. For that reason, the challenged instruction was harmless.

## SUMMARY

In the final analysis, Defendant received a fair trial. The jury was properly allowed to consider Conrail's destruction of the injury-causing chain. The instructions at trial were not objected to in form and were consistent with substantial justice.

The issues presented involve nothing more than the application of well-settled principles of law. Those settled principles should not be disturbed. As the issues presented are not leave-worthy, as there is nothing extraordinary about the appellate court's decision, and as there is no reversible error, this Court should deny leave or summarily affirm.

**RELIEF SOUGHT**


WHEREFORE, Plaintiff-Appellee WILLIAM FRANK WARD prays  
that this Honorable Court deny the Application for Leave to Appeal or Affirm.

Respectfully submitted,

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Dated: November 5, 2004

STATE OF MICHIGAN )  
 )ss.  
COUNTY OF WAYNE )

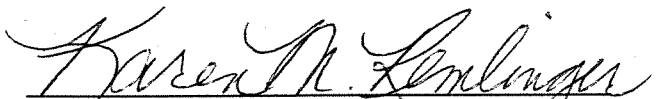
DEBORAH JOHNSON, being first duly sworn, deposes and says that on the 5<sup>th</sup> day of November, 2004, she caused to be served, **Plaintiff's Supplemental Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal (Re: Adverse Inference Instruction) and Proof of Service**, upon:

GREGORY A. CLIFTON, ESQ.  
JOSEPH J. McDONNELL, ESQ.  
**Durkin, McDonnell, Clifton & O'Donnell, P.C.**  
645 Griswold, Suite 3253  
Detroit, Michigan 48226

by enclosing copies of same in envelopes with first class postage fully prepaid thereon and depositing them in the U.S. mail at Detroit, Michigan.

  
DEBORAH JOHNSON

Subscribed and sworn to before me  
this 5<sup>th</sup> day of November, 2004

  
KAREN M. REMLINGER, Notary Public  
Wayne County, Michigan  
My Commission Expires: 12/28/05